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TAN JOON KIANG

v.

AM FINANCE BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH JC
[CIVIL SUIT NO: S5-22-1403-2003]
29 SEPTEMBER 2009

C ***TORT:*** *Negligence - Duty of care - Damages - Bankruptcy proceedings - Injury to reputation - Whether litigant owes duty of care to adversary in conduct of litigation proceedings*

TORT: *Malicious prosecution - Elements of tort - Damages - Bankruptcy proceedings - Injury to reputation - Want of reasonable or probable cause and malice*

D

The defendant filed a claim against the plaintiff for the sum of RM36,483.45 together with interest, contending that the plaintiff was a guarantor in respect of a hire-purchase transaction. The
E defendant succeeded in obtaining judgment in default of appearance. Bankruptcy proceedings were commenced and the plaintiff was adjudged a bankrupt. The plaintiff was unaware of these events until he attempted to renew his passport and was informed that he could not do so as he had been adjudged a
F bankrupt. The plaintiff then engaged solicitors. Subsequently, the default judgment was set aside on the basis that it was an irregular judgment and soon after, by consent, the receiving and adjudication order against the plaintiff was also set aside. The defendant eventually withdrew its claim against the plaintiff. The
G plaintiff was naturally upset with the whole situation as his reputation was tarnished. He claimed that he never signed any guarantee and that he was never served with any documents regarding the claim against him, and he filed the present suit seeking damages for negligence and malicious prosecution. The
H following issues required consideration: (i) whether a litigant owes a duty of care to his adversary in relation to the conduct of litigation proceedings; and (ii) whether the elements of malicious prosecution were proven.

I

Held (dismissing the plaintiff's suit):

(1) There is admittedly a fine line between the hardship caused to defendants in meeting and defending baseless claims and the public interest of not discouraging honest claims. However, this balance is sufficiently addressed by having malice as an essential ingredient before one can be held to account for errors in litigation proceedings. In this way, although there may not be a remedy in negligence there may still be available a remedy in a claim for malicious proceedings in bankruptcy and liquidation, malicious abuse of civil process or vexatious abuse of process. Accordingly, a litigant does not owe a duty of care in negligence to his adversary in the conduct of litigation proceedings. The plaintiff's claim in this regard must, therefore, fail. *Bus*iness *Computers International Ltd v. Registrar of Companies* (foll); *Rondel v. Worsley* (foll). (paras 14 & 15)

(2) In the face of a guarantee containing the signatures and particulars of the plaintiff – from the evidence disclosed – the defendant was perfectly entitled to file its claim without further enquiry. The claim was eventually withdrawn because, as explained by an officer of the defendant, the witness to the guarantee could not be located. There may have been an error in the service of the summons but there was no sinister or improper motive for it. It was an error that was not uncommon. The defendant, after having obtained the default judgment, was perfectly within its rights to resort to bankruptcy proceedings. This is a fairly common occurrence. What the plaintiff was seeking to do in this case was to somehow equate what appeared at most to be mere negligence with something more sinister. But this could not be right. Compared to negligence, malicious prosecution requires greater culpability in the form of want of reasonable or probable cause and malice. In the instant case, the only evidence adduced was an error in the service of the summons and nothing more, which was a long way off from proving malicious prosecution. For these reasons, the claim in this regard must also fail. *Vijendran Ponniah v. MBf Country Homes & Resort Sdn Bhd & Anor* (dist); *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* (foll). (paras 28 & 29)

Case(s) referred to:

Business Computers International Ltd v. Registrar of Companies [1987] 3 All ER 465 ***(foll)***

Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Dorset Yacht Co Ltd v. Home Office [1970] AC 1004 ***(refd)***

Gibbs v. Rea [1998] AC 786 ***(refd)***

Glinski v. McIver [1962] AC 726 ***(refd)***

Herniman v. Smith [1938] AC 305 ***(refd)***

Hicks v. Faulkner [1878] 8 QBD 167 ***(refd)***

Isaacs v. Robertson [1984] 3 All ER 140 ***(refd)***

Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529 ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***

Quartz Hill Consolidated Gold Mining Company v. Eyre [1883] 11 QBD 674 ***(refd)***

Radivojeric v. LR Industries Ltd [1984], Transcript No. 1514 ***(refd)***

Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***

Rondel v. Worsley [1967] 3 All ER 993 ***(foll)***

Tempest v. Snowden [1952] 1 KB 130 ***(refd)***

Vijendran Ponniah v. MBF Country Homes & Resort Sdn Bhd & Anor [2002] 2 CLJ 157 ***(dist)*** *HC* ***(refd)***

Williams v. Taylor [1829] C Bing 182 ***(refd)***

For the plaintiff - Pramjit Kaur; M/s Mann & Assoc
For the defendant - KY Wong; M/s Darshan Chong & Co

Reported by Suresh Nathan

JUDGMENT

Harmindar Singh JC:

[1] The plaintiff is a businessman. The defendants are bankers. On 7 August 1994, the defendant filed a claim against the plaintiff in the Kota Bharu Sessions Court for the sum of RM36,483.45 together with interest. It was claimed that the plaintiff had stood as guarantor for one Zamri bin Ismail on a hire-purchase transaction for vehicle Isuzu Commando bearing registration number TN 6912. The guarantee agreement was dated 10 September 1994.

[2] On 20 May 1995, the defendants obtained judgment in default of appearance. Bankruptcy proceedings were commenced and the plaintiff was adjudged a bankrupt in 25 June 1998. There is nothing unusual about this except that the plaintiff was unaware of these events.

[3] Sometime in 1999, the plaintiff went to the Immigration office to renew his passport. He was then told that he could not do so as he had been adjudged a bankrupt. He then engaged solicitors.

[4] On 25 January 2001, the default judgment was set aside on the basis that it was an irregular judgment. Soon after, by consent, the receiving and adjudication order against the plaintiff was set aside. Eventually, on 23 June 2002, the defendants withdrew their claim against the plaintiff.

[5] The plaintiff was naturally upset with the whole turn of events as his reputation was tarnished. He claimed that he never signed any guarantee and that he was never served with any documents regarding the claim against him. He has now filed this claim seeking damages for negligence and for malicious prosecution. He has particularized his damages as RM1,000,000 for loss of profits, RM1,000,000 for injury to reputation, damages for emotional distress, aggravated damages, interest and costs.

Negligence

[6] The plaintiff contends that the defendants had negligently obtained judgment against the plaintiff and proceeded to execute the said judgment by bankruptcy proceedings culminating in the plaintiff being declared a bankrupt. The particulars of negligence were pleaded as follows in the amended statement of claim:

Butir-Butir

(a) gagal memastikan bahawa Penghakiman Ingkar tidak dapat diperolehi;

(b) gagal memastikan samada Penghakiman Ingkar dapat diperolehi;

(c) dengan membenarkan Penghakiman Ingkar diperolehi;

(d) gagal memastikan tidak ada tuntutan terhadap Plaintif;

(e) gagal memastikan samada ada satu tuntutan terhadap Plaintif;

A (f) gagal memastikan samada Perintah Penerimaan dan Penghukuman tersebut tidak dapat diperolehi;

(g) gagal memastikan bahawa tidak dapat diperolehi Perintah Penerimaan dan Penghukuman;

B (h) dengan membenarkan diperolehi Perintah Penerimaan dan Penghukuman.

[7] Before considering whether there was negligent conduct in this case, a policy question arises which must be determined at the outset. The question is this. Does a litigant owe a duty of care C to his adversary in relation to the conduct of litigation proceedings? It may seem tempting to conclude that based on Lord Atkin's celebrated enunciation of the principles of negligence in *Donoghue v. Stevenson* [1932] AC 562, a duty of care was incumbent on the defendant as the plaintiff has no doubt suffered D damage as a direct result of the defendant's actions. This would be in keeping with the notion of justice that there must be a remedy for every wrongdoing, harm or loss suffered.

[8] This Atkin test has undoubtedly withstood serious scrutiny E over the years. In fact, the House of Lords in *Dorset Yacht Co Ltd v. Home Office* [1970] AC 1004 provided ringing endorsement of the Atkin test where Lord Reid observed (at p 1027):

> the well-known passage in Lord Atkin's speech should I think be F regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

G **[9]** Whether a duty of care exists or not in a given set of circumstances has been the subject of much discussion in a series of decisions in the Privy Council and the House of Lords. Of particular significance is the House of Lords decision in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 where Lord Bridge H approved of the approach as follows (at p 617):

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the I law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[10] Coming back to the issue at hand, the factual matrix of the instant case bears some resemblance to the case of *Business Computers International Ltd v. Registrar of Companies* [1987] 3 All ER 465. In that case, a petition to wind up the plaintiff company was served at the wrong address so that the plaintiff company was unaware of it. A winding-up order was made against the plaintiff company. When the plaintiff company discovered this, they applied to have it set aside. They also claimed damages against the defendants for negligence. The plaintiff claimed that it was owed a duty of care by the petitioner to take reasonable care to ensure that the registered office of the plaintiff was correctly stated in the petition, that the matters in the petition were properly verified and that the petition was properly served at the plaintiff's registered office.

[11] This case, it should be noted, was decided before the decision in *Caparo Industries plc v. Dickman, supra*. However, Scott J relied on the House of Lords decision of *Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 where it was held that in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so. The following is how Scott J appraised the issue of duty of care (at p. 472):

> Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the origination process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonist. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulated the rules and requirements that must be observed by the two parties. The Plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind,

A conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on *ex parte* applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care.

C And then came to the following conclusion (at p. 473):

I take this passage from Sir John Donaldson MR's judgment as supporting the view that I have endeavoured to express, namely that control of litigation and of the various steps taken in D prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought *via* a tortious duty of care imposed on one party for the benefit of the other.

This view is not, in my opinion, undermined but is reinforced by the facts of the present case. Counsel for the plaintiff has E submitted forcefully that the plaintiff has been damnified, through no fault of its own, and that, on the plaintiff's pleaded case, the damage would not have happened had the second defendant exercised proper care in ascertaining the correct address of the plaintiff's registered office. All this I am prepared to accept. But F the damage of which the plaintiff complains was caused by the legal process instituted by the second defendant and by the winding-up order made by the court. Damage of this character is not, in my judgment, apt to be remediable in an action based on tortious negligence.

G In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort. H

I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

I

[12] For myself, I do not see any reason why this approach should not be adopted. I agree that public interest is best served if honest litigants are not cowed by the fear of damages from bringing honest claims for adjudication. The administration of justice will be better promoted if such actions are not discouraged.

[13] In *Rondel v. Worsley* [1967] 3 All ER 993, Lord Pearce said (at p. 1204):

> The legal process inevitably created hardships and it is not always easy to see what is the right balance. In attempting to do so one must regard the interrelation of the various parts. It is a hardship that a man who had done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation. … But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages.

[14] Admittedly, there is a fine line between the hardship caused to defendants in meeting and defending baseless claims and the public interest of not discouraging honest claims. However, this balance is sufficiently addressed by having malice as an essential ingredient before one can be held to account for errors in litigation proceedings. In this way, although there may not be a remedy in negligence, there may still be available a remedy in a claim for malicious proceedings in bankruptcy and liquidation, malicious abuse of civil process or vexatious abuse of process.

[15] Accordingly, I accept that no duty of care in negligence is owed by a litigant to his adversary in the conduct of litigation proceedings. The plaintiff's claim in this regard must therefore fail.

Malicious Prosecution

[16] An alternative claim of malicious prosecution was also pleaded in para 9 of the amended statement of claim as follows:

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> 9. Defendan menegaskan Defendan dengan niat jahat (maliciously) telah memperolehi Penghakiman Ingkar dan/atau Perintah Penerimaan dan Penghukuman tersebut untuk memalukan Plaintif dan/atau mengaibkan Plaintif dan/atau rosakkan nama Plaintif.

B **[17]** There was no doubt that an action can arise for malicious proceedings in bankruptcy. In *Quartz Hill Consolidated Gold Mining Company v. Eyre* [1883] 11 QBD 674 CA, Brett MR said (at p. 684):

> ... It seems to me that an action can be maintained for
C maliciously procuring an adjudication under the Bankruptcy Act 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair name, even although he does not suffer a
D pecuniary loss. That seems to be the ground upon which Cleasby, B., supported the action in *Johnson v. Emerson* (Law Rep. 6 Ex. 329, at p. 310), and I think that his view was right. By proceedings in bankruptcy a man's fair name is injured just as much since the Bankruptcy Act 1869, as it was before, because he is openly charged with insolvency before he can defend
E himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

[18] As in an ordinary case of malicious prosecution, it is
F necessary to show, first, that the proceedings terminated favourably in favour of the plaintiffs; secondly that there was absence of reasonable and probable cause for bringing them; and thirdly, that there was malice or improper motive (per May LJ in *Radivojeric v. LR Industries Ltd.* [1984], Transcript No. 1514, CA as cited in *Business Computers Ltd. v. Registrar of Companies, supra*
G at p. 469).

[19] What is reasonable and probable cause? The definition by Hawkins J in *Hicks v. Faulkner* [1878] 8 QBD 167 at 171 was approved by the House of Lords in *Herniman v. Smith* [1938] AC
H 305 and our Federal Court in *Rawther v. Abdul Kareem* [1966] 1 LNS 154 and reads as follows:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction,
I founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[20] What is malice? "Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive" (*Gibbs v. Rea* [1998] AC 786 at 797 PC). What will constitute want of reasonable and probable cause and malice will depend on the facts and circumstances of each case. In *Williams v. Taylor* [1829] C Bing 182; 130 ER 125, Tindal CJ observed:

> What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable was that the accuser had no ground for proceeding but his desire to injure the accused. (cited with approval in *Robin v. Sunrise Investments (Pte) Ltd.* [1991] 2 MLJ 517).

[21] It should be noted also that if reasonable and probable cause is established, then malice becomes irrelevant (*Tempest v. Snowden* [1952] 1 KB 130). And absence of reasonable cause cannot be inferred from malice (*Glinski v. McIver* [1962] AC 726).

[22] In the instant case, there was no doubt that the proceedings terminated in favour of the plaintiff. The receiving and adjudication order was annulled. In fact, the defendants withdrew the summons against the plaintiff.

[23] But the pivotal question is whether there was want of reasonable and probable cause and malice. The whole action against the plaintiff was on the guarantee that he was alleged to have signed. The plaintiff claimed that he never signed the guarantee and it was contended on his behalf that the defendants should have enquired as to this fact before the action was filed.

[24] It was further contended that bankruptcy proceedings were instituted based on an irregular judgment and that the defendants did not enquire as to whether the judgment was served or not before proceeding to institute bankruptcy proceedings. What I can gather from the submission of learned counsel for the plaintiff is that the institution of bankruptcy proceedings on an irregular judgment showed malice and want of reasonable and probable cause.

[25] The evidence disclosed that there was a guarantee allegedly signed by the plaintiff which the plaintiff denied but which contained particulars of the plaintiff which particulars were admitted to be correct. The summons was served *via* substituted

service. Default judgment was then obtained. The application to set aside was supported by several grounds including short service and failure to comply with the rules relating to substituted service. What is noteworthy however is that the summons was in the end advertised in the newspapers. Although it was conceded that the judgment was irregularly obtained, it remained unclear as to why exactly it was irregular.

[26] In this regard, the plaintiff relied extensively and almost entirely on the case of *Vijendran Ponniah v. MBF Country Homes & Resort Sdn Bhd & Anor* [2002] 2 CLJ 157. In that case there was also a claim for damages due to civil malicious prosecution arising out of bankruptcy proceedings instituted against him by the defendants who had earlier obtained judgment in default of appearance. However, in that case, there was a finding of fact that there was a concealment of material facts within the knowledge of the defendants. I do not think, with respect, that that decision established any firm principle of law but was decided on the peculiar facts that existed in that case.

[27] On the question of the effect of an irregular judgment, I would with respect, prefer to rely on Supreme Court decision in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343, where it was held that a default judgment until set aside is a good and enforceable judgment. Speaking for the court, Hashim Yeop Sani CJ (Malaya) approved as correct the law stated in *Isaacs v. Robertson* [1984] 3 All ER 140 where the headnote reads:

> Orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignore with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void *ipso facto* without the need for proceedings to set them aside.

[28] In the instant case, in the face of a guarantee which contained the signature and particulars of the plaintiff, the defendants were perfectly entitled to file their claim without further enquiry. The claim was eventually withdrawn because as explained by SD1, an officer of the defendant bank, the witness to the

guarantee could not be located. There may have been an error in the service of the summons but I was not apprised of any sinister or improper motive for it. It was an error which was not uncommon.

[29] After having obtained the default judgment, the defendants were also perfectly within their rights to resort to bankruptcy proceedings. This I believe is a fairly usual occurrence. It seems to me that what the plaintiff is seeking to do in this case is to somehow equate what appears at most to be mere negligence with something more sinister. But this cannot be right. As I had indicated earlier, compared to negligence, malicious prosecution requires greater culpability in the form of want of reasonable or probable cause and malice. In the instant case, the only evidence adduced was an error in the service of the summons and nothing more. In my view, this is a long way off from proving malicious prosecution. For these reasons, the claim in this regard must also fail.

[30] In the circumstances, the plaintiff's claim is dismissed with costs.